IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 42 of 1992

For Approval and Signature:

HON'BLE MR.JUSTICE D.A.MEHTA
and
HON'BLE MS.JUSTICE H.N.DEVANI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

COMMISSIONER OF INCOME TAX

Versus

PRATIK PRINTS,

Appearance:

1. INCOME TAX REFERENCE No. 42 of 1992
MR MANISH R BHATT for Petitioner
MR JP SHAH for Respondent

CORAM : HON'BLE MR.JUSTICE D.A.MEHTA
and
HON'BLE MS.JUSTICE H.N.DEVANI

Date of decision: 15/12/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.A.MEHTA)

1. The Income Tax Tribunal, Ahmedabad Bench "A", Ahmedabad has referred the following question for the opinion of this Court under Section 256(1) of the Income Tax Act, 1961 (the Act) at the instance of the applicant - Revenue.

"Whether, on the facts and circumstances of the case, the Tribunal was right in confirming the decision of the CIT (A), Surat, holding that investment allowance could not be withdrawn u/s 155(4A) in the case of the assessee?"

2. The Assessment Years are 1977-78 and 1978-79 and the corresponding accounting periods are the Financial Years ended on 31st March 1977 and 31st March 1978. The assessee, a partnership firm, was granted investment allowance of Rs.1,55,293=00 and Rs.81,000=00 for Assessment Years 1977-78 and 1978-79 respectively. However, the assessing officer, acting under provisions of Section 155(4A) of the Act, withdrew the investment allowance originally granted on the ground that, as the firm was dissolved on 31st March 1978, the assets in question had been transferred to the partner, who had taken over the same from the assessee firm; and the second ground was that, under Section 32A(5)(b), it was not possible for the assessee firm to utilize the reserve within the statutory period of ten years for purchasing new machinery or plant as required by the section.

3. The assessee carried the matter in appeal for both the years and succeeded before the Commissioner of Income Tax (Appeals). The Revenue carried the matter in second appeal before the Tribunal. The Tribunal, for the reasons stated in its order dated 31st December 1990, upheld the order of the Commissioner (Appeals), holding that there was no justification for withdrawing the investment allowance granted to the assessee.

4. Heard the learned standing counsel for the revenue. It is submitted that when the firm was dissolved, all the assets belonging to the firm were transferred to the erstwhile partner who took over the entire business. That, in these circumstances, provisions of Section 32A(5)(a) of the Act would come into play and it was required to be held that investment allowance had been wrongly granted. In the alternative, it was submitted that Section 32A(5)(b) of the Act required that the assessee utilize the amount credited to the reserve account under sub-section (4) of Section 32A

of the Act at any time before expiry of ten years from the end of the previous year in which the machinery or plant was installed. That, in the present case, admittedly, when the firm was dissolved, it was not possible for the firm to utilize the said reserve within the statutory period of ten years and even on this count, the orders made by the assessing officer withdrawing investment allowance were required to be upheld. In support of the submissions, reliance was placed on the decision of the Supreme Court of India in the case of Commissioner of Income Tax v. Vijaya Production (P) Ltd., 243 ITR 181.

5. Section 32A(5), as is relevant for the present, reads as under :

"32A(5). Any allowance made under this section in respect of any ship, aircraft, machinery or plant shall be deemed to have been wrongly made for the purposes of this Act -

(a) if the shop, aircraft, machinery or plant is sold or otherwise transferred by the assessee to any person at any time before the expiry of eight years from the end of the previous year in which it was acquired or installed; or

(b) if at any time before the expiry of ten years from the end of the previous year in which the ship or aircraft was acquired or the machinery or plant was installed, the assessee does not utilize the amount credited to the reserve account under sub-section (4) for the purposes of acquiring a new ship or a new aircraft or new machinery or plant [other than machinery or plant of the nature referred to in clauses (a), (b) and (d) of the proviso to sub-section (1)] for the purposes of the business of the undertaking; or

(c) if at any time before the expiry of the ten years aforesaid, the assessee utilizes the amount credited to the reserve account under sub-section (4) for distribution by way of dividends or profits or for remittance outside India as profits or for creation of any assets outside India or for any other purpose which is not a purpose of the business of the undertaking,

and the provisions of sub-section (4A) of Section

155 shall apply accordingly."

5.1 Section 155(4A) of the Act reads as under :

"155(4A). Where an allowance by way of investment allowance has been made wholly or partly to an assessee in respect of a ship or an aircraft or any machinery or plant in any assessment year under Section 32A and subsequently -

(a) at any time before the expiry of eight years from the end of the previous year in which the ship or aircraft was acquired or the machinery or plant was installed, the ship, aircraft, machinery or plant is sold or otherwise transferred by the assessee to any person other than the Government, a local authority, a corporation established by a Central, State or Provincial Act or a Government Company as defined in Section 617 of the Companies Act, 1956 (1 of 1956), or in connection with any amalgamation or succession referred to in sub-section (6) or sub-section (7) of Section 32A; or

(b) at any time before the expiry of ten years from the end of the previous year in which the ship or aircraft was acquired or the machinery or plant was installed, the assessee does not utilize the amount credited to the reserve account under sub-section (4) of Section 32A for the purposes of acquiring a new ship or a new aircraft or new machinery or plant other than machinery or plant of the nature referred to in Clauses (a), (b) and (d) of the proviso to sub-section (1) of Section 32A for the purposes of the business of the undertaking; or

(c) at any time before the expiry of ten years referred to in Clause (b), the assessee utilizes the amount credited to the reserve account under sub-section (4) of Section 32A -

(i) for distribution by way of

dividends or profits; or

(ii) for remittance outside India as profits or for the creation of any asset outside India; or

(iii) for any other purpose which is not a purpose of the business of the undertaking,

the investment allowance originally allowed shall be deemed to have been wrongly allowed, and the Income-tax Officer may, notwithstanding anything contained in this Act, recompute the total income of the assessee for the relevant previous year and make the necessary amendment, and the provisions of section 154 shall, so far as may be, apply thereto, the period of four years specified in sub-section (7) of that section being reckoned, --

(i) in a case referred to in Clause (a), from the end of the previous year in which the sale or other transfer took place;

(ii) in a case referred to in clause (b), from the end of the ten years referred to in that clause;

(iii) in a case referred to in clause (c), from the end of the previous year in which the amount was utilized."

6. In so far as the first submission is concerned, it is necessary that the machinery or plant is sold or otherwise transferred by the assessee to any person at any time before the expiry of eight years from the end of the previous year in which it was installed. This issue stands concluded by a decision of the Apex Court in case of Malabar Fisheries Co. v. Commissioner of Income Tax, 120 ITR 49, wherein the Court was called upon to deal with identical controversy in relation to withdrawal of development rebate. In almost similar circumstances, a firm consisting of four partners carrying on six different businesses came to be dissolved and under the deed of dissolution, one of the businesses was taken over by one of the partners, while the remaining five

businesses were taken over by two of the other partners. Development rebate granted to the firm was withdrawn on the ground that there was a sale or transfer of the machinery within the meaning of Section 34(3)(b) read with Section 2(47) of the Act. It was held that:

> "Having regard to the above discussion, it seems to us clear that a partnership firm under the Indian Partnership Act, 1932, is not a distinct legal entity apart from the partners constituting it and equally in law the firm as such has no separate rights of its own in the partnership assets and when one talks of the firm's property or firm's assets all that is meant is property or assets in which all partners have a joint or common interest. If that be the position, it is difficult to accept the contention that upon dissolution the firm's rights in the partnership assets are extinguished. The firm as such has no separate rights of its own in the partnership assets, but it is the partners who own jointly or in common the assets of the partnership and, therefore, the consequence of the distribution, division or allotment of assets to the partners which flows upon dissolution after discharge of liabilities is nothing but a mutual adjustment of rights between the partners and there is no question of any extinguishment of the firm's rights in the partnership assets amounting to a transfer of assets within the meaning of section 2(47) of the Act. In our view, therefore, there is no transfer of assets involved even in the sense of any extinguishment of the firm's rights in the partnership assets when distribution takes place upon dissolution."

7. The decision in case of CIT v. Vijaya Production (supra) was a converse case wherein the assessee's proprietary business was converted into a partnership and the revenue withdrew the development rebate allowed to the proprietor - assessee. The Apex Court relied upon its own decision in case of Sunil Siddharthbhai v. CIT, 156 ITR 509 (SC) and stated that the point at issue was covered by the said decision and accordingly, reversed the decision of the Madras High Court. However, it is necessary to note that, in case of Sunil Siddharthbhai (supra), the contention which has been raised today was specifically raised before the Supreme Court and after referring to the decision in the case of Malabar Fisheries (supra) and other decisions, it was held that:

"When a partner retires or the partnership is dissolved, what the partner receives is his share in the partnership. What is contemplated here is a share of the partner qua the net assets of the partnership firm. On evaluation, that share in a particular case may be realised by the receipt of only one of all the assets. What happens here is that a shared interest in all the assets of the firm is replaced by an exclusive interest in an asset of equal value. That is why it has been held that there is no transfer. It is the realization of a pre-existing right. The position is different, it seems to us, when a partner brings his personal asset into the partnership firm as his contribution to its capital."

Therefore, the aforesaid decision representing a converse situation cannot carry the case of the Revenue any further.

8. It is necessary to take note of the two decisions of the Supreme Court. In South India Steel Rolling Mills v. Commissioner of Income Tax, 224 ITR 654, the Court upheld the action of the Commissioner of Income Tax under Section 263 of the Act withdrawing the development rebate by referring to provisions of Section 33(1)(a) read with Section 34(3)(a) of the Act. It was observed that the machinery or plant had to be owned by the assessee and wholly used for the purposes of the business carried on by the assessee, and further that, the reserve had to be utilized by the assessee during the period of eight years for the purpose of business of the undertaking. That the said condition could not be stated to have been complied with in case of a dissolved firm. The Court took note of the fact that Section 155 of the Act was not invoked, but that was no reason to limit the power of the Commissioner under Section 263 of the Act. The earlier decision in case of Malabar Fisheries (supra) was referred to and the Court noted that it was not called upon to decide the issue in context of Section 34(3)(b) of the Act.

9. This decision came to be cited before the another Bench of the Apex Court in case of Commissioner of Income Tax v. S. Balasubramanian, 230 ITR 934. The respondent therein was a coparcener of a Hindu Undivided Family who carried on business. On a partial partition of the joint family, plant and machinery which had been the subject matter of development rebate was allotted to two

coparceners. The said two coparceners thereafter sold away to third party the plant and machinery allotted to them. The assessing officer withdrew the development rebate by invoking section 155(5) of the Act. The matter ultimately travelled upto Supreme Court and the Apex Court, after reiterating the principles laid down in case of Malabar Fisheries (supra), held that there was no transfer of assets by the Hindu Undivided Family to its coparceners on partition. It was further held that, in view of the unity of ownership and community of interest of all coparceners in a joint Hindu family business, the position on partition of the joint Hindu family business, whether it be partial or complete, is very similar in law to the position on dissolution of a partnership firm. However, the Court, after referring to the earlier decision in case of South India Steel Rolling Mills (supra), held that the power vested in the assessing officer under Section 155(5) had to be exercised in accordance with the provisions of the said section and only if the circumstances which are required to exist are shown to be existing. It was further observed that, because the coparceners sold the machinery to third party, the condition regarding user under Section 33 of the Act was not fulfilled and hence, the provisions of Section 155(5) of the Act were rightly invoked. At the same time, it was held that in case of Malabar Fisheries (supra), the said question was never raised because, possibly, the machinery remained with the partners who were allotted the same on dissolution.

10. In the present case also, it is not even the case of the Revenue that the machinery which was allotted to the partners on dissolution was subsequently transferred within the statutory period and hence, the ratio in case of Malabar Fisheries (supra), as reiterated by the Apex Court in case of S. Balasubramanian (supra), would apply on all fours.

11. It is necessary to note that, in a subsequent decision, in case of Commissioner of Income Tax v. Dalmia Magnesite Corporation, 236 ITR 46, the Apex Court has once again reiterated the position that power under Section 155(5) of the Act could not be invoked in case of dissolution of a firm, because, there was no transfer of plant by the assessee firm. This was a case where the dissolution was automatic on death of one of the partners when the firm was constituted by only two partners.

12. In so far as Clause (b) of sub-section (5) of Section 32A is concerned, it is stipulated that investment allowance shall be deemed to have been wrongly

granted if at any time within the specified period of ten years, the assessee does not utilize the amount credited to the reserve account. The Revenue contends that in case of the assessee, on dissolution, it is not able to utilize the amount credited to the reserve account, and hence, it be held that the investment allowance was wrongly granted. This submission cannot be accepted on a plain reading of the provisions.

13. As can be seen from the Clause (a) of sub-section (5) of Section 32A of the Act, it requires that machinery or plant is sold or otherwise transferred by the assessee to any person. Meaning thereby, the assessee in question has to be in existence and there has to be an overt act on the part of the assessee in selling or transferring the asset in question. Similarly, Clause (b) requires that the assessee does not utilize the amount credited to the reserve account. In this Clause also, the language employed by the legislature goes to show that there has to be a positive act by the assessee concerned. The same position prevails in Clause (c) where an assessee is required to utilize the amount credited to the reserve account for specified purposes only. In other words, if Clauses (b) and (c) are read together, the legislative intent appears to be that an assessee has to either positively utilize the reserve for specified purposes or it fails to utilize the reserve within the statutory period. But in both the situations, existence of the assessee is a pre-requisite condition i.e. the assessee who was granted investment allowance and from whose hands, the withdrawal is to be made by the revenue under Section 155(4A) of the Act.

14. This position becomes abundantly clear when one goes to Section 155(4A) wherein the period of limitation is prescribed for all the three situations envisaged by Clauses (a), (b) or (c) respectively. In case referred to in Clause (a), the period of four years has to be reckoned from the end of the previous year in which the sale or transfer took place; in case referred to in Clause (b), the period of limitation has to be reckoned from the end of the ten years referred to in that clause; and in case referred to in Clause (c), from the end of the previous year in which the amount was utilized. (Emphasis supplied). Therefore, even for invoking Clause (b) of sub-section (5) of Section 32A of the Act, it is necessary that in case of an existing assessee, the period of ten years has to be reckoned before the said provision can be invoked. But, where the assessee itself does not exist, it is not possible to state that the assessee has not utilized or assessee does not utilize

within the statutory period. The revenue's contention, therefore, that alternatively the withdrawal of investment allowance should be confirmed in light of Section 32A(5)(b) of the Act does not merit acceptance.

15. However, it is also necessary to note that, on facts, the Tribunal has taken cognizance of the fact that the reserve pertaining to Assessment Year 1977-78 was utilized for purchase of machineries in the immediate succeeding accounting period when the assessee was in existence; and the reserve relating to Assessment Year 1978-79 was utilized by the partner, who took over the business for purchasing machinery in the immediate succeeding year.

16. In the result, there being no infirmity in the order of the Tribunal, the question referred for the opinion of this Court is answered in the affirmative i.e. in favour of the assessee and against the Revenue.

17. The reference stands disposed of accordingly. There shall be no order as to costs.

[D.A.MEHTA, J.]

[H.N.DEVANI, J.]

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